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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1951

No. 204

RICHARD GUESSEFELDT, PETITIONER,

vs.

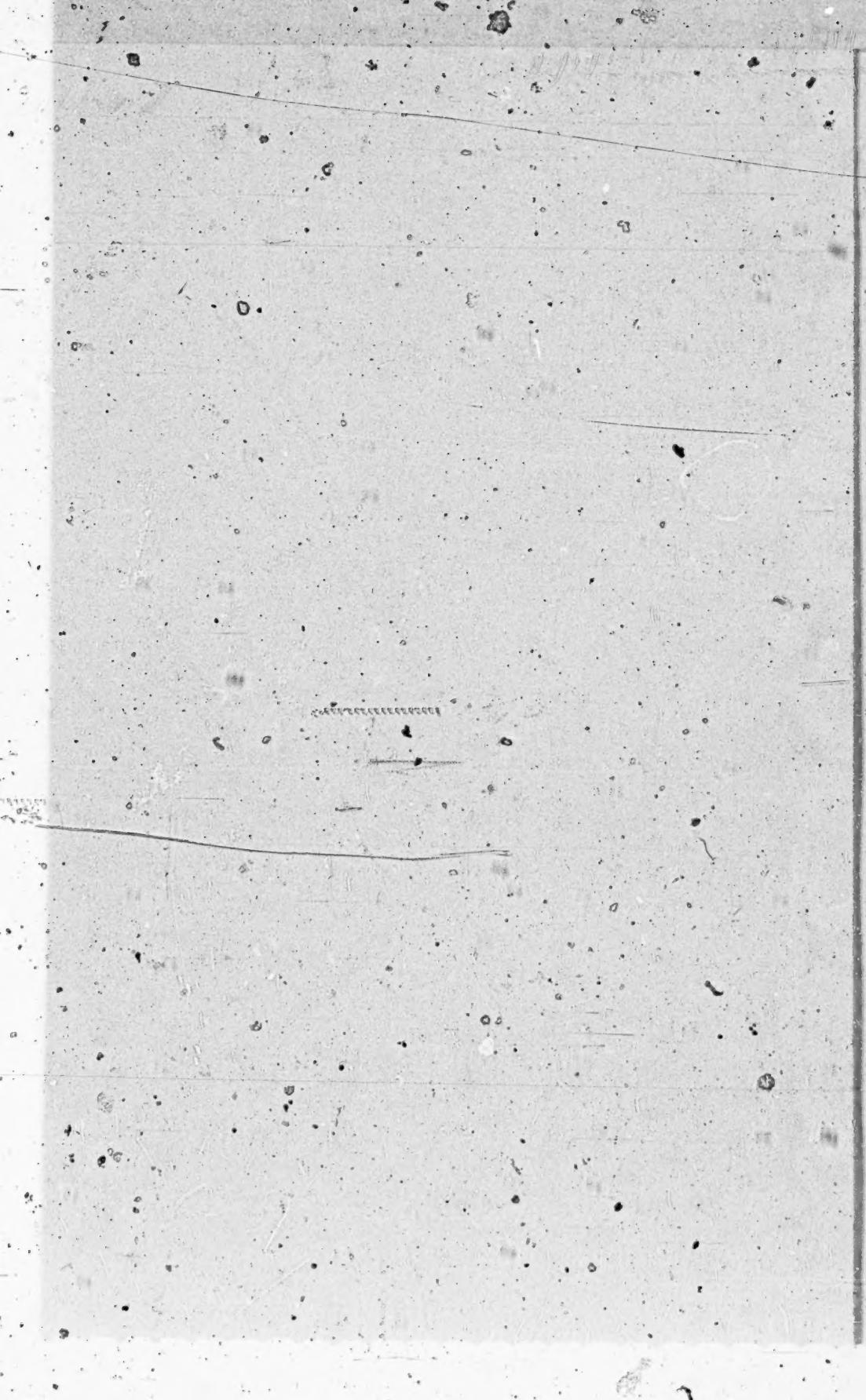
**J. HOWARD McGRATH, AS SUCCESSOR TO THE
ALIEN PROPERTY CUSTODIAN, AND GEORGIA
REESE CLARK, AS TREASURER OF THE UNITED
STATES.**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

PETITION FOR CERTIORARI FILED JULY 26, 1951,

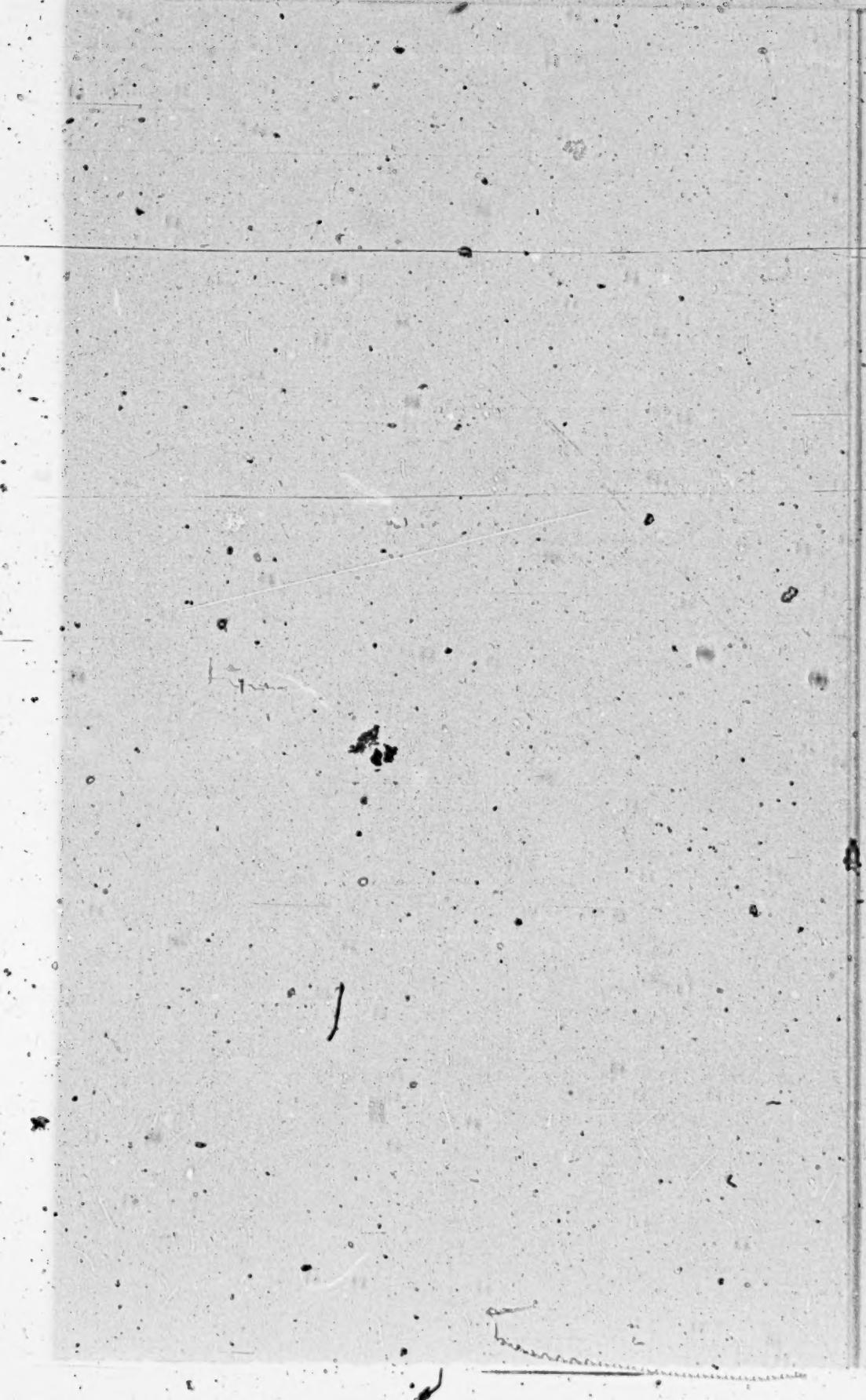
CERTIORARI GRANTED OCTOBER 8, 1951.

APPENDIX



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IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA CIRCUIT.

No. 10600.

RICHARD GUESSEFELDT, *Appellant,*

v.

J. HOWARD McGRATH, as successor to the Alien
Property Custodian, and

GEORGIA NEESE CLARK, as Treasurer of the
United States, *Appellees.*

Appeal from Final Order of the United States District Court
for the District of Columbia.

Pertinent Docket Entries.

- 12/5/49—Complaint and Exhibits filed.
- 2/1/50—Motion of plaintiff for summary judgment filed.
- 2/3/50—Motion of defendants to dismiss filed.
- 3/14/50—Memorandum Opinion denying plaintiff's motion
for summary judgment and granting defendants' motion to dismiss filed—Tamm, J.

3/17/50—Order granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment filed—/s/ Tamm, J.

3/28/50—Notice of Appeal by Plaintiff (copy mailed to Oliver Dibble and Walter T. Nolte, Dept. of Justice) filed.

3/30/50—Stipulation of counsel designating record on appeal filed.

1 . Filed Dec 5 1949

IN THE UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF COLUMBIA

Civil Action No. 5153'49.

RICHARD GUESSEFELDT, 2175 Kalia Road, Ocean View Court,
Honolulu, Hawaii; *Plaintiff*,

v.

J. HOWARD MCGRATH, as successor to the ALIEN PROPERTY
CUSTODIAN, Office of the Attorney General of the United
States, Department of Justice, Washington 25, D. C.
and

GEORGIA NEESE CLARK, as Treasurer of the United States
Treasury Department, Washington 25, D. C.,
Defendants.

Complaint.

(For return of property seized under the "Trading With
The Enemy Act")

1. This action arises under the "Trading With The
Enemy Act", as amended, (50 USCA, App., sec. 1 et seq.,),
and is authorized by section 9 thereof (50 USCA, App.,
sec. 9).

It is brought by plaintiff in his own behalf as the sole
owner of the hereinafter described property.

2. The defendant, J. Howard McGrath is the duly ap-
pointed and qualified Attorney General of the United

States and, as such, pursuant to Executive Order 9788 (50 USCA, App. sec. 6, note), is the successor to the Alien Property Custodian and the transferee or assignee of all property and interests heretofore acquired by the Alien Property Custodian.

3. The defendant, Georgia Neese Clark, is the duly appointed and qualified Treasurer of the United States and, as such, is the custodian of all monies transferred to the Alien Property Custodian pursuant to the "Trading With The Enemy Act".

4. Plaintiff is a resident of Hawaii, and ever since 1896 has resided continuously and without interruption in Hawaii. He has never resided elsewhere since 1896.

2. 5. Plaintiff was born in Germany in 1870. He is still technically a German citizen although he has filed application to become a citizen of the United States.

6. In April, 1938, plaintiff, accompanied by his wife and daughter who is a citizen of the United States, left Hawaii for a vacation in Germany. Permits were issued to them to re-enter the United States after a temporary visit abroad. Such permits, as extended, expired in March, 1940. Upon the outbreak of the World War in September, 1939, plaintiff and his family, in spite of persistent efforts made by them, were unable to secure return passage to Hawaii within the period referred to in said re-entry permits. The plaintiff and his family received no warning or admonition at any time from the State Department, American consulate or any other officer of the United States, to depart for his home in Hawaii.

Plaintiff and his family were compelled to remain involuntarily in Germany, an enemy country, during hostilities, entirely dependent upon a few relatives for the bare necessities of life. Plaintiff and his wife were not able to return to the United States until July, 1949, although their daughter preceded them and returned to the United States in January, 1947, having secured United States passport in October, 1945, for her return.

During his enforced and temporary absence in Germany for the aforesaid period 1938-1949 amounting to virtual incarceration, plaintiff did not own property of any kind in Germany, purchased no war bonds or any other securities of that country, did not vote in any elections, did not engage in any efforts directly or indirectly in aid of or assistance to the war effort of that country or of any enemy or ally of an enemy of the United States. He was never directly or indirectly employed by or in the service of any government which was an enemy of the United States, and never committed any act hostile or inimical to the interests of the United States.

Plaintiff and his family were under constant surveillance, from the cessation of hostilities in 1945 to his departure for the United States in 1949, of the Russian military forces in that portion of Germany occupied by such forces.

3 As a result of such surveillance, plaintiff endured further and inordinate hardships in the Russian occupied zone.

At the time of plaintiff's departure on the temporary visit abroad as aforesaid, he took only sufficient funds with him for that and no other purpose. His entire estate, accumulated and earned by him in Hawaii, was included in a deed of trust with the Bishop Trust Company, Ltd., of Honolulu, Hawaii, executed in 1934 and more particularly referred to hereinafter. During his enforced absence aforesaid his household goods, books and similar personalty were in storage with the City Transfer Company, Ltd., of Honolulu, Hawaii. Access to any and all funds possessed by plaintiff has been prevented by a blocking order of the Treasury Department of the United States.

7. On February 5, 1948, and May 12, 1949, the then duly appointed and qualified Director of the Office of Alien Property, purporting to act under the said "Trading With The Enemy Act" and Executive Orders No. 9193, as amended, and No. 9788 (50 USCA, App. sec. 6, note), issued Vesting Orders No. 10616 (13 Fed. Reg. 702, 703) and No. 13253 (14 Fed. Reg. 2887, 2888), respectively. Said vesting

orders, copies of which are annexed hereto as Exhibits "A" and "B" and made a part hereof, purported to vest in the defendant Attorney General all of the plaintiff's property therein described, being the property under trust agreement dated May 11, 1934, as amended by trust deed of January 18, 1938, between plaintiff and the said Bishop Trust Company, Ltd., Honolulu, Hawaii, including all accrued income therefrom, and all personality stored with the said City Transfer Company, Ltd., Honolulu, Hawaii, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest and for the benefit of the United States.

On August 27, 1948, said Trust Company delivered to the defendants herein, or one of them, the sum of \$24,018.75 in cash, being the net income accruing from said trust estate as of June 30, 1948, due and payable to plaintiff from the aforesaid trust estate theretofore vested under Vesting Order 10616, and said sum is now in the possession of the defendant Treasurer of the United States.

4. On January 24, 1949, said Trust Company notified the Director of the Office of Alien Property that it would not make further payments of such accrued income in the future and also demanded return of said sum of accrued income, which demand has not been acknowledged or complied with.

8. Except for the aforesaid vesting orders, plaintiff is entitled to all benefits of ownership in the property seized thereunder. At the time of vesting said property belonging to plaintiff, and at all times prior and subsequent thereto, he was not an enemy or an ally of an enemy of the United States. Said property and any interest therein belonging to plaintiff was not, and never has been, payable or deliverable to or claimed by an enemy or an ally of an enemy or a national of a designated enemy country; said property in the possession of the defendants, or one of them, is entirely devoid of any enemy characteristics or enemy taint or the taint of any ally of any enemy of the United States, and therefore said property has never been owned or controlled,

directly or indirectly, in whole or in part, by an enemy or an ally of an enemy, or a national of a designated enemy country, within the meaning of the provisions of said "Trading With The Enemy Act" or any Executive Order or Orders promulgated pursuant thereto.

9. At all times during the existence of hostilities between the United States and Germany and its allies, access to the aforesaid trust estate of plaintiff and the proceeds thereof having been blocked by the Treasury Department as aforesaid, which blocked status has never been terminated, such estate and the proceeds thereof were never in danger of falling into the hands of an enemy or the ally of an enemy or under its direct or indirect control.

10. After the issuance of said vesting orders, the plaintiff, on, to wit, July 18, 1949, duly filed with the Director, Office of Alien Property, Department of Justice, a claim under oath in conformity with the requirements of said Director (Form APC-1A), demanding the return of said property and estate, but no application therefor was made to the President of the United States, yet neither property nor estate has been returned to the plaintiff:

WHEREFORE, plaintiff demands judgment as follows:

(1) That plaintiff is entitled to all the property and estate and the proceeds thereof, seized under Vesting Orders 10116 and 13253, and to the immediate possession thereof;

5 (2) That an order and decree be made herein requiring defendants to restore to the plaintiff all of said property and estate; and

(3) Such other relief as may be just and equitable in the premises and costs of this action.

/s/ ROBERT F. KLEPINGER,

Attorney for plaintiff

1720 "M" Street, N. W.
Washington 6, D. C.

7
Filed December 5, 1949**Plaintiff's Exhibit "A."**

[Vesting Order 10616, Feb. 14, 1948; 13 Fed. Reg. 702, 703]

RICHARD GUESSEFELDT AND BISHOP TRUST CO., LTD.

In re: Trust under deed between Richard Guessefeldt and Bishop Trust Company, Limited, a Hawaiian Corporation, dated May 11, 1934, as amended by trust deed dated January 18, 1938. File No. F 28-9945, 9945 G-1.

Under the authority of the Trading With the Enemy Act, as amended, Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law, after investigation, it is hereby found:

1. That Richard Guessefeldt, Margarethe Guessefeldt, Agnes Mewes, Albert Guessefeldt, Kate Bocatius, Gertrude Bocatius and Carl Bocatius, whose last known address is Germany, are residents of Germany and nationals of a designated enemy country (Germany);
2. That the issue, names unknown, of Agnes Mewes, of Albert Guessefeldt, of Kate Bocatius, of Gertrude Bocatius and of Carl Bocatius, who there is reasonable cause to believe are residents of Germany, are nationals of a designated enemy country (Germany);
3. That the Town of Hevelberg, Havel, Germany, is a political subdivision of a designated enemy country (Germany);
4. That all right, title, interest and claim of any kind or character whatsoever of the persons identified in subparagraphs 1 and 2 hereof and each of them, and the political subdivision named in subparagraph 3 hereof, in and to and arising out of or under that certain trust agreement dated May 11, 1934, and as amended January 18, 1938, by and between Richard Guessefeldt as Settlor and the Bishop Trust Company, Limited, as Trustee, and in and to the property held thereunder by said Bishop Trust Company, Limited, as Trustee including but not limited to the rights

of said Richard Guessefeldt to direct the manner and payment of income from said Trust, to withdraw assets from the corpus thereof and to revoke, amend or modify the terms of the aforesaid instrument, as amended, is property within the United States owned or controlled by payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid nationals of a designated enemy country (Germany) and the aforesaid political subdivision of a designated enemy country (Germany);

and it is hereby determined:

5. That to the extent that the persons named in subparagraph 1 hereof and the issue, names unknown Agnes Mewes, Albert Guessefeldt, Kate Bocatius, Gertrude Bocatius and Carl Bocatius, are not within a designated enemy country, the national interest of the United States requires that such persons be treated as nationals of a designated enemy country (Germany).

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest.

There is hereby vested in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

Executed at Washington, D. C., on February 5, 1948.

For the Attorney General.

[SEAL]

DAVID L. BAZELON,
Assistant Attorney General,
Director, Office of Alien Property.

[F. R. Doc. 48-1364; Filed, Feb. 13, 1948; 8:49 a. m.]

7 Filed December 5, 1949

Plaintiff's Exhibit "B."

[Vesting Order 13253, May 12, 1949; 14 Fed. Reg. 2887;
2888]

Re: Stock and personal property owned by Richard Guessefeldt. F-28-5958-C-1.

Under the authority of the Trading With the Enemy Act, as amended, Executive Order 9193, as amended, and Executive Order 9788, and pursuant to law after investigation, it is hereby found:

1. That Richard Guessefeldt, whose last known address is Drake Str. Number 30, Berlin-Lichterfelde West, Germany, is a resident of Germany and a national of a designated enemy country (Germany);

2. That the property described as follows:

a. Those certain shares of stock described in Exhibit A, attached hereto and by reference made a part hereof, registered in the names of the persons set forth in Exhibit A, presently stored with the City Transfer Co., Ltd., Post Office Box 460, Honolulu, T. H., for and on behalf of Bishop Trust Company, Limited, Post Office Box 2390, Honolulu, T. H., as agent for the aforesaid Richard Guessefeldt, together with all declared and unpaid dividends thereon, and

b. Those certain articles of personal property more particularly described in Exhibit B, attached hereto and by reference made a part hereof, presently stored with City Transfer Co. Ltd., Post Office Box 460, Honolulu, T. H., for and on behalf of Bishop Trust Company Limited, Post Office Box 2390, Honolulu, T. H., as agent for the aforesaid Richard Guessefeldt, is property within the United States owned or controlled by, payable or deliverable to, held on behalf of or on account of, or owing to, or which is evidence of ownership or control by, the aforesaid national of a designated enemy country (Germany);

and it is hereby determined:

3. That to the extent that the person named in subparagraph 1 hereof is not within a designated enemy country, the national interest of the United States requires that such person be treated as a national of a designated enemy country (Germany).

All determinations and all action required by law, including appropriate consultation and certification, having been made and taken, and, it being deemed necessary in the national interest,

There is hereby vested in the Attorney General of the United States the property described above, to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States.

The terms "national" and "designated enemy country" as used herein shall have the meanings prescribed in section 10 of Executive Order 9193, as amended.

Executed at Washington, D. C., on May 12, 1949.

For the Attorney General.

(SEAL)

DAVID L. BAZELON,
*Assistant Attorney General,
Director, Office of Alien Property.*

[For Exhibits A and B in the above vesting order, see Transcript of Record herein, pages 7, 8 and 9.]

[F. R. Doc. 49-4324, Filed May 31, 1949; 8:50 a. m.]

10

Filed February 1, 1950

Plaintiff's Motion for Summary Judgment.

[SAME TITLE]

Plaintiff moves the Court, pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure, to enter a summary judgment in his favor on the following grounds:

1. There is no genuine issue as to any material fact;
2. Plaintiff is entitled to a judgment as a matter of law.

This motion is based upon the complaint heretofore filed in this action, and the affidavits hereunto attached of plain-

tiff, Christel Guessefeldt, Tracy Egbert Davis, W. K. Schultze, V. J. Moranz, and the medical findings of Dr. Jerome L. Jacoby, marked Exhibits "A" - "F", respectively.

*/s/ ROBERT F. KLEPINGER
Attorney for plaintiff.*

26 Filed February 3, 1950

Motion to Dismiss.

The defendants move the Court as follows:

1. To dismiss the action because the complaint fails to state a claim against defendants upon which relief can be granted.

February 3, 1950.

Respectfully submitted,

*/s/ WALTER T. NOLTE,
Chief Trial Attorney,
Litigation Branch*

*/s/ OLIVER DIBBLE,
Attorney,
Litigation Branch
Attorneys for Defendants
Department of Justice,
Washington 25, D. C.*

28 Filed March 14, 1950

Memorandum Opinion.

Plaintiff brings this action for return of property seized under the "Trading With The Enemy Act" (50 USCA App. § 1 et seq.), hereinafter referred to as the Act. The Government having moved to dismiss thereby concedes the following well pleaded facts:

Plaintiff was born in Germany in 1870 and moved to Hawaii in 1896 where he has since resided. In April 1938 plaintiff, accompanied by his wife and daughter, who is a citizen of the United States, left Hawaii for a trip to Germany. Permits were issued to them to re-enter the United States, which permits, as extended, expired in March 1940. Following the outbreak of World War II in September 1939, plaintiff and his family were unable to secure return passage to Hawaii within the period referred to in said re-entry permits. On the contrary they were compelled to remain involuntarily in Germany during hostilities. Plaintiff's daughter returned to the United States in January 1947, but plaintiff and his wife were unable to re-

29 turn until July 1949. During his enforced stay in

Germany, plaintiff did not own property of any kind there, purchased no war bonds or other securities, did not vote in any elections; did not engage in any efforts directly or indirectly in aid of or assistance to the war effort of Germany or of any enemy or ally of an enemy of the United States, nor was he ever directly or indirectly employed by or in the service of any government which was an enemy of the United States and never committed any act hostile or inimical to the interests of the United States. Plaintiff's entire estate was included in a deed of trust with the Bishop Trust Company, Ltd. of Honolulu, Hawaii, executed in 1934, amended by trust deed of January 18, 1938, and during his absence from Hawaii plaintiff's household goods, books and similar personality were in storage with the City Transfer Company, Ltd. of Honolulu, Hawaii. On his departure from Hawaii, plaintiff took with him to cover expenses of his trip, the sum of \$6,500 and when his return was made impossible, in June 1940 he withdrew \$6,000 from the trust fund and again in May 1941 he withdrew an additional \$4,000 therefrom.

On February 5, 1948 and May 12, 1949, the then duly appointed and qualified Director of the Office of Alien Property, acting under the said Act and Executive Orders No.

9193, as amended, and No. 9788 (50 USCA App. § 6 note) issued Vesting Orders No. 10616 (13 Fed. Reg. 702, 703) and No. 13253 (14 Fed. Reg. 2887, 2888) respectively. Said Orders vested in the Attorney General all of plaintiff's property therein described, being the property under the aforesaid trust agreement of May 11, 1934, as amended, including all accrued income therefrom, and all personality stored with the aforesaid Transfer Company in Honolulu "to be held, used, administered, liquidated, sold or otherwise dealt with in the interest of and for the benefit of the United States."

On August 27, 1948, said Trust Company delivered to the defendants the sum of \$24,018.75 in cash, being the net income accruing from said trust estate as of June 30, 1948, and said sum is now in the possession of the defendant Treasurer of the United States.

On January 24, 1949 said Trust Company notified the Director of the Office of Alien Property that it would not make further payments of such accrued income in the future and also demanded return of said sum theretofore paid, which demand has not been acknowledged or complied with.

On July 18, 1949 plaintiff filed with the Director of the Office of Alien Property, a claim under oath in conformity with the requirements of said Director (Form APC-1A), demanding the return of said property and estate, but no application therefor was made to the President of the United States and neither property nor estate has been returned to the plaintiff.

On November 2, 1949 plaintiff and his wife filed their declarations of intention to become naturalized citizens of the United States and on December 9, 1949 they received their first papers (Nos. 78276 and 78274). Since July 1949 plaintiff, his wife and daughter have been staying in Flushing, Long Island, New York, and aside from the wages of their daughter who is employed by a New York Department store, plaintiff and his wife are without funds.

In addition to the Government's Motion to Dismiss, plaintiff has filed a Motion for Summary Judgment pursuant to Rule 56 (a) of the Federal Rules of Civil Procedure.

Plaintiff brings this action under § 9 of the Act¹ on the theory that he is not an enemy or ally of an enemy.

31 Section 2 of the Act defines the terms "enemy" and "ally of enemy", in pertinent part as follows:

"(a) Any individual *** of any nationality, resident within the territory *** of any nation with which the United States is at war ***

(c) Such other individuals *** as may be natives, citizens, or subjects of any nation with which the United States is at war *** as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "enemy" .

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory *** of any nation which is an ally of a nation with which the United States is at war ***.

(c) Such other individuals, or body or class of individuals, as may be natives, citizens, or subjects of any nation which is an ally of a nation with which the United States is at war *** as the President, if he shall find the safety of the United States or the successful prosecution of the war shall so require, may, by proclamation, include within the term "ally of enemy" .

¹ "(b) Any person not an enemy or ally of enemy claiming any interest, right or title in any money or other property which may have been conveyed *** to the Alien Property Custodian *** may file with the said custodian a notice of his claim under oath *** and may thereafter institute suit in equity in the Supreme Court of the District of Columbia [now the United States District Court for the District of Columbia] to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment *** or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

The President never issued any proclamations pursuant to section (e) above.

Section 5 (b) of the Act grants to the President, and to his delegates by Executive Orders issued pursuant thereto, the power to vest the property of a national of a designated enemy country and, of course, the formal declaration of war made Germany an enemy country. The constitutionality of this provision of the Act has been upheld by the Supreme Court in the case of *Silesian American Corporation v. Clark*, 332 U. S. 469, (1947) wherein Justice Reed wrote:

"... There is no doubt but that under the war power, as heretofore interpreted by this Court, the United States, acting under a statute may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property."

The question presented then is whether the plaintiff was an enemy, an ally of an enemy or a national of an enemy
32 ~~country~~ at the time these vesting orders were issued.

Technically, of course, plaintiff is a citizen of Germany, but it cannot very well be argued that he was "resident within the territory" of any nation with which the United States is at war" when he was involuntarily detained in Germany during the period of hostilities. It is hornbook law that to effect a change of residence two essentials are necessary, namely: (1) an intention to abandon the old and, (2) an intention to remain in the new domicil. As some writers express it, there must be an *animus non revertendi* and an *animus manendi*. Moreover the acts of the person must correspond with such purpose and the change of residence must be voluntary. *Morris v. Gilmer*, 129 U. S. 315, 32 L. Ed. 690, 9 S. Ct. 289. There is nothing in the record before the Court to indicate that the plaintiff had any such intention when he went from Hawaii to Ger-

many in 1938, or during his sojourn in Germany thereafter.² Accordingly, I find and so hold that plaintiff would not have been estopped from recovering under § 9 (a) of the Act.

Following World War I, the Courts³ liberally construed the Act so as to allow recovery of property owned by persons who were free from "enemy taint". But this Court is faced with the fact that on July 3, 1948 the Congress enacted a new section of the Act (50 U.S.C.A. App. 39) which provides that:

"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." * * * (emphasis supplied).

33 The next question to be decided is whether plaintiff was a national of Germany within the intendment of Section 39 of the Act.

This Act, being one in which the sovereign consents to be sued, is one of grace and must be strictly construed. It is subject to revision or complete repeal at any time. *Lynch v. United States*, 292 U.S. 571, 581. Section 39, in particular, relates to property which had vested in the United States after December 17, 1941 and as stated by Mr. Justice Butler, speaking for the Court, in *Cummings v. Deutsch Bank*, 300 U.S. 115, 120:

"The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon

² This view is supported by many cases including *Stadtmauer v. Miller*, 111 Fed. 2d 732 (1926); *Fowinkel v. First Fed. Trust Co.*, 10 Fed. 2d 19 (1926); Opinions of the Attorney General (1922) von Passavant; (1931) Weber; (1922) Goldschmidt; (1921) Haverland; (1921) Hohner and (1920) Jung; *Josephberg v. Markham*, 152 Fed. 2d 644; *Sarthon v. Clark*, 78 F. S. 139 (1948); *McGrath v. Zander*, 177 Fed. 2d 649 (1949), and see 148 ALR 1423, et seq.

³ *Silesian American Corp. v. Clark*, 332 U.S. 469; *Clark v. Uebersee Finanz Korp.*, 332 U.S. 481.

the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. * * * Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property. *But that detention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct.*" (emphasis supplied)

By Executive Order 8389 (12 USCA 95 (a) note) the term "national" was defined to include [5 E (i)]:

"Any person who has been domiciled in, or a *subject, citizen or resident of a foreign country* at any time on or since the effective date of this Order." (emphasis supplied)

This Order was approved by the Congress in a Joint Resolution dated May 7, 1940, 54 Stat. 179, and reaffirmed by § 10 (a) of Executive Order 9095 (50 USCA App. 5 note). Furthermore, in the Nationality Act of 1940, Congress itself defined the term "national" to mean "a person owing permanent allegiance as a *citizen or a subject or otherwise to a state.*" (emphasis supplied) 5 C. F. R. 301.1.

The legislative purpose of Section 39 manifestly
 34 was to exclude all citizens and subjects of Germany or Japan from recovering property vested in or transferred to the Government after December 17, 1941, in accordance with the provisions of the Act. In the hearings before the Senate Judiciary subcommittee considering the bill (80th Cong. 2d Sess., Hearings on H. R. 4044; Feb. 17, 19, March 9 and May 11, 1948) p. 233, one witness before the Committee testified that "the effect of this bill would be an extension of the statutory definition of enemies, so as to encompass enemy nationals who lived elsewhere than in

enemy or enemy occupied territory." He enumerated several classes of persons who would fall under the proposed Section 39 including (p. 234) "Germans who left Germany possibly long before the war and now live, for instance, in South America or even in this country without having acquired another nationality". To which Senator Cooper replied: "Why should their property be returned to them any more than property returned to Germans in Germany?" A statement filed by another witness appearing in opposition to the bill (pp. 254, 255) pointed out that "The confiscation provisions of the bill do not discriminate between friendly aliens and unfriendly ones." Likewise, in the House of Representatives, Congressman Cox speaking of that section of the bill which was to become Section 39 of the Act, on the floor of the House said: (94th Cong. Record, Part I, 80th Cong. 2d Sess., p. 551) "Many perfectly innocent people will, under the bill, lose their all".

It is significant to note here that this section was enacted as a part of the War Claims Act of 1948, to provide an initial source of funds for the compensation of eligible United States nationals, and in the light of the foregoing it is evident that Congress was well aware, in enacting this section of the Act, that persons situated as plaintiff is here would be hurt. However, plaintiff argues that Congress did not intend § 39 to be a limitation on §§ 2 and 9 (a), but this argument is untenable. Had Congress not so intended it would have been a simple matter for it to have used in § 39 the language employed in §§ 2 and 9 (a), but in choosing the term "national" it must be presumed to have intended that that word should be given the meaning which Congress itself had used.

Plaintiff relies heavily on the Stadtmuller case, *supra*, decided in 1926 and the Zander case, *supra*, decided by our Court of Appeals in 1949. The Stadtmuller case was decided long before the enactment of § 39 of the Act and cannot be controlling here. While reference is made to § 39 in the briefs submitted to the Court in the Zander case by the

parties thereto and by the amici curiae, it should be noted that that case was filed in this Court on March 24, 1948, while § 39 was not passed by the Congress and approved by the President until July 3, 1948. Furthermore, in the Zander case, sight should not be lost of the fact that Mrs. Zander was an American citizen and even though she married a German citizen and was involuntarily detained in Germany during the war, under the Cable Act (42 Stat. 1022) her American citizenship was preserved. In the instant case, plaintiff was born in Germany and though he lived in Hawaii from 1896 to 1938, so far as the record indicates, he made no attempt to become a United States citizen until November 2, 1949. Without attempting to determine or evaluate the factors, circumstances or reasons why plaintiff, during more than 40 years' residence in Hawaii, never applied for American citizenship, the fact remains that he never renounced his German citizenship, nor attempted to exercise his opportunity to become a citizen of the United States. Having presumably elected to remain a German citizen, he now must bear the responsibilities and consequences of the election which he himself made.

As was held by Kaufman, J., in *Schill v. McGrath*, S. D. N. Y., Civil Action 53-16, decided February 21, 1950:

"Section 39 might be considered harsh, and innocent persons may suffer because of it. Indeed, it has even been suggested by one Representative that the bill could be characterized as 'legalized robbery' (94 Cong. Rec. I, supra, P. 551). The Government, however, has the right, under the war power clause of the Constitution (Art. 2, Sec. 8, Cl. 11) to confiscate property of a national of an enemy nation, and this right is not limited by the due process or just compensation clause."

On the point as to whether § 39 of the Act does violence to the Fifth amendment to the Constitution, it is well to remember that

"Rights of the individual, under our Federal Constitution and its amendments, are not absolute. When such rights

come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. There is no individual right so absolute that it may be exercised under any and all circumstances, and without any qualification." *Ex parte Kanai*, 46 F. S. 286, 288.

And, as was said in *Henderson v. Kimmel*, 47 F. S. 635, 642: "If the Act is an appropriate means to a permitted end there is little scope for the operation of the Due Process Clause."

In the final analysis, this Court must give consideration to the Act as a whole and "The policy as well as the letter of the law is a guide to decisions". *Markham v. Cabell*, 326 U. S. 404.

If the results of this opinion are unduly harsh in their effect on this plaintiff, his remedy and relief must be obtained through the Congress. The provisions of § 39 of the Act as heretofore quoted place him in such a legal status that the affording of relief is outside the sphere of judicial remedy, and solely within the area of legislative remedy.

Plaintiff's Motion for Summary Judgment is denied, Defendants' Motion to Dismiss is granted, and counsel will present appropriate Order.

March 14, 1950.

/s/ EDWARD A. TAMM,
Judge.

37

Filed March 17, 1950

Order.

The above-entitled matter having come on for hearing in open court and the court having considered the oral argument and the points and authorities and memoranda submitted and the court's opinion filed herein on March 14, 1950, it is by the court this 17th day of March, 1950:

ORDERED that the defendants' motion to dismiss be granted, and

ORDERED that the plaintiff's motion for summary judgment be denied.

/s/ EDWARD A. TAMM,
Judge

Approved as to form:

/s/ ROBERT F. KLEPINGER,
Attorney for Plaintiff

38

Filed March 28, 1950

Notice of Appeal.

Sirs: Notice is hereby given that the plaintiff, Richard Guessefeldt, hereby appeals to the United States Court of Appeals for the District of Columbia from the final order entered in this action on March 17, 1950 granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment.

Washington, D. C.

March 28, 1950

/s/ ROBERT F. KLEPINGER,
Attorney for Plaintiff.

To:

WALTER F. NOLTE,

OLIVER DIBBLE,

Office of Alien Property,

Department of Justice,

Washington, D. C.

Attorneys for Defendants.

Filed March 30, 1950

Stipulation Designating Record on Appeal.

It is hereby stipulated and agreed between the parties to the above entitled cause that the record on appeal shall include the following papers only:

1. Docket entries;
2. Complaint and exhibits thereto;
3. Plaintiff's Motion for Summary Judgment;
4. Defendants' Motion to Dismiss;
5. Memorandum Opinion;
6. Order granting defendants' motion to dismiss and denying plaintiff's motion for summary judgment;
7. Notice of Appeal;
8. Stipulation designating record on appeal.

/s/ ROBERT F. KLEPINGER,
Attorney for Plaintiff.

/s/ OLIVER DIBBLE,
Attorney for Defendants.

[fol. 40]

Thursday, March 8, 1951.

Before Honorable Henry W. Edgerton, Bennett Champ
Clark and James M. Proctor, Circuit Judges:

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH, as successor to the Alien Property
Custodian, and GEORGIA NEESE CLARK, as Treasurer of the
United States, Appellees

On motion of Mr. George B. Searls, Mr. Ralph S. Spritzer
of the Bar of the Court of Appeals of New York was per-
mitted to argue for Appellees pro hac vice by special leave
of Court.

Argument was commenced by Mr. Robert F. Klepinger
for Appellant and was concluded by Mr. Spritzer. Court
stated it would allow Appellees to file mimeographed copies
of opinion of the Court of Appeals in case of Nagao v.
Clark.

[fol. 41] [Stamp:] United States Court of Appeals for the District of Columbia Circuit. Filed May 3, 1951. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH, as successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, as Treasurer of the United States, Appellees

Appeal from Judgment of The United States District Court for the District of Columbia

Decided May 3, 1951

Mr. Robert F. Klepinger for appellant.

Mr. Ralph S. Spritzer, of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Assistant Attorney General Baynton and Mr. George B. Seearls, Attorney, Department of Justice, were on the Brief, for appellees. Messrs. George Morris Fay, United States Attorney, and Joseph M. Howard, Assistant United States Attorney, also entered appearances for appellees.

Mr. George Eric Rosden filed a brief as *amicus curiae*, urging reversal.

Before Edgerton, Clark, and Proctor, Circuit Judges

CLARK, Circuit Judge:

This is an appeal from the United States District Court for the District of Columbia. Appellant brought his suit in that court for the return of property vested pursuant to Section 5 (b) of the *Trading With the Enemy Act*, 55 Stat. 839, 50 U. S. C. A. App. § 5 (b).

The complaint states, *inter alia*, that the appellant was born in Germany in 1870 and that he is still a citizen of that country. The appellant has been a resident of Hawaii since 1896, but he is not a citizen of the United States. The complaint alleges that he was present in Germany between

April 1938 and July 1949, but that his stay in Germany after the outbreak of World War II was involuntary. It is further alleged that the appellant committed no act hostile to the interests of the United States during the enforced stay.

[fol. 42] The Attorney General moved to dismiss the complaint on the ground that the appellant's German citizenship, without more, disqualifies him from recovery under the Act. The District Court so held, and the basis of that decision was Section 39 of the Act, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39, which declares in part:

"No property or interest therein of Germany, Japan, or any national of either such country vested in or transferred to any officer or agency of the Government at any time after December 17, 1941, pursuant to the provisions of this Act, shall be returned to former owners thereof or their successors in interest, and the United States shall not pay compensation for any such property or interest therein." (Emphasis supplied).

The appellant brings this suit under Section 9(a) of the Act, 42 Stat. 1531, 50 U. S. C. App. § 9(a). The lower court decided that the appellant would be entitled to the return of this property under that section of the *Trading With the Enemy Act, supra*, except for Section 39 of the Act, *McGrath v. Zander*, 85 U. S. App. D. C. 334, 177 F. (2d) 649 (1949) which affirmed the rule in *Stadtmauer v. Miller*, 11 F. (2d) 732 (C. C. A. 2, 1926).

The issue before us then is simply this, has Section 39 of the Act, which prohibits return of World War II vested property to a national of Germany, prevented recovery of such property by a German citizen. We must conclude that the present law precludes a recovery. Although we can sympathize with the situation in which the appellant finds himself, the statute is quite specific. Concededly the appellant is and always has been a German citizen, and a citizen is necessarily a national of the country of which he is a citizen (here Germany). See *Miyuki Okihara v. Clark*, 71 F. Supp. 319 (D. C. Hawaii 1947), and Executive Order 8389, Section 5 E (i), 5 Fed. Reg. 1400 (1940), as amended by Executive Order 8785, 6 Fed. Reg. 2897 (1941). Executive Order No. 9193, Section 19(a) 7 Fed. Reg. 5205 (1942) incorporates the definition of the term "national" as used

in Executive Order 8389, *supra*. Consequently, Section 39 operates as a complete bar to the appellant's suit.

The appellant has called to the attention of this Court the opinion by Judge Lindley of the Seventh Circuit in *Nagano v. McGrath*, U. S. Court of Appeals for the Seventh Circuit, February 26, 1951:

The facts, we must conclude, are almost identical, but we regret that we cannot reach the same ultimate conclusion. The Court of Appeals for the Seventh Circuit has nonetheless, to a large extent, anticipated our decision. There, our brethren, speaking through Judge Lindley, said:

"Therefore, by Act of Congress, the word 'national' as defined in the Executive Orders approved by Congress, includes any person who is a citizen of a foreign country. Thus, if Section 39 is to be taken at its literal face value, it is the law that a citizen of Japan is a national of that nation and that such plaintiff may not recover her property even though Section 9(a) giving her right of action has not been expressly repealed."

The Seventh Circuit did not believe that this result was anticipated by the nation's Legislature when it determined "Congress . . . has at all times evinced an intent not to keep [fol. 43] from loyal residents, whether alien or citizen, non-enemy property which is rightfully in America, has served no enemy purpose and has threatened to serve none." With this proposition we can only agree in part, as the remainder of this decision will disclose.

To a large extent in the *Nagano Case*, *supra*, the Seventh Circuit based its opinion on the proposition that Congress did not intend to repeal Section 9(a) which provides for the return of the property heretofore vested. We quite agree. If Congress had intended to completely repeal Section 9(a) it would have so declared. So far, however, as Section 39 is in irreconcilable conflict with Section 9(a), it must be deemed to have superseded Section 9(a). *Henderson v. Washington-Marlboro and Annapolis Motor Lines*, 77 U. S. App. D. C. 26, 132 F. (2d) 729 (1942), Cert. den., *Washington-Marlboro and Annapolis Motor Lines v. Henderson*, 63 S. Ct. 853, 318 U. S. 779 (1943).

Under Section 5(b) property of "any foreign country or national thereof" can be vested. Section 9(a) provides for the return of property to "any person not an enemy or

ally of [an] enemy." Enemy as defined in Section 2(a) 40 Stat. 411, 50 U. S. C. App. 62, is "Any individual . . . resident within the territory . . . of any nation with which the United States is at war . . ." Section 39 does not speak in terms of enemy or an ally of an enemy, but on the contrary it returns to the standard of "nationality." That section declares that no return shall be made to "Germany, Japan, or any national of either such country," if it has been vested. It should be quite apparent that Section 5(b) permits the property of all nationals of foreign countries to be vested, but Section 39 only prohibits return to nationals of Germany or Japan. There is then a group of nationals of foreign countries other than Germany and Japan who may still prove their claims under Section 9(a) if they were not enemies or allies of enemies under Section 2(a). Understandably Congress did not intend to repeal Section 9(a) in its entirety, but a very large restriction is imposed on that provision by Section 39.

Section 39 was enacted as part of the *War Claims Act of 1948*, 62 Stat. 1246, 50 U. S. C. Supp., App. § 39; it is a statute which provides compensation to certain classes of United States nationals who suffered at the hands of the Germans or the Japanese during World War II. Among the principal beneficiaries of the law are American internees and prisoners of war who were the victims of maltreatment while held by the enemy. In Section 13(a) of the *War Claims Act of 1948*, 62 Stat. 1247, 50 U. S. C. A. App. § 2012, it is provided that the source of funds for the payment of these claims shall be the net proceeds derived from German and Japanese vested property withheld under Section 39 of the *Trading With the Enemy Act*. In short, the Congress believed that all enemy assets should be assembled for the purpose of gratifying the claims of American nationals which arose out of enemy actions. By this provision Congress intended to institute a policy of non-return and non-compensation. H. R. 976, 80th Cong. 1st Sess., pp. 2-3 (1947).

In line with the policy of non-return and non-compensation Congress was aware that the term "national" as used in Section 39 would take in nationals wherever resident and regardless of their personal disposition toward the enemy. [fol. 44] See Hearings before a Sub-committee of the Committee on the Judiciary, U. S. Senate, 80th Cong. 2d Sess.,

on H. R. 4044, p. 233. When the bill came to the floor of the House of Representatives, Congressman Cox recognized that the criterion of nationality left no room for distinguishing between the friendly and the unfriendly enemy nationals 94 Cong. Rec. 551. It seems perfectly clear to us then that Section 39 of the *Trading With the Enemy Act* was intended to apply to all German and Japanese nationals living in the United States or elsewhere whose property had been vested. *Shill v. McGrath*, 89 F. Supp. 339 (S. D. N. Y. 1950).

But even friendly nationals of Germany or Japan are not barred from *all* relief under the *Trading With the Enemy Act*. Section 32 of the Act empowers the President to make discretionary administrative returns of World War II vested property to various specially designated classes of persons; Section 32 was specifically exempted from the rigorous effect of Section 39, *Shill v. McGrath, supra*. But as we held in *McGrath v. Zander, supra*, the right of return under Section 32 is administrative and discretionary, and there is no right to review the judgment of the administrative authorities. Consequently the judgment of the lower court is

Affirmed.

[fol. 45] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1951.

United States Court of Appeals for the District of Columbia Circuit. Filed May 3, 1951. Joseph W. Stewart, Clerk.

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD McGRATH, as successor to the Alien Property Custodian, and GEORGIA NEESE CLARK, as Treasurer of the United States, Appellees

Appeal from the United States District Court for the District of Columbia.

Before: Edgerton, Clark, and Proctor, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, affirmed.

Per Circuit Judge Clark.

Dated May 3, 1951.

[fol. 46] [Stamp:] United States Court of Appeals for
the District of Columbia Circuit. Filed May 17, 1951,
Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH AND GEORGIA NEESE CLARK, Appellees.

DESIGNATION OF RECORD

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Appendix to appellant's brief filed herein May 18, 1950.
2. Minute entry of argument.
3. Opinion.
4. Judgment.
5. This designation.
6. Clerk's certificate.

Robert F. Klepinger, 1720 "M" Street, Northwest,
Washington 6, D. C., Attorney for Appellant.

Dated: May 17, 1951.

[fol. 47] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 10600

RICHARD GUESSEFELDT, Appellant,

v.

J. HOWARD MCGRATH AND GEORGIA NEESE CLARK, Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I have today served by mail a copy of the Motion to Authorize Clerk to Transmit Original Transcript of Record to the Supreme Court of the United States and Designation of Record upon attorneys for appellees.

Robert F. Klepinger, 1720 "M" Street, Northwest,
Washington 6, D. C., Attorney for Appellant.

Dated: May 17, 1951.

[fol. 48] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 204

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 8, 1951

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted. The case is transferred to the summary docket and assigned for argument immediately following No. 169, McGrath, Attorney General, etc. vs. Nagano.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Clark took no part in the consideration or decision of this application.